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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SOUTH CAROLINA EDUCATION ASSOCIATION, NELLE H. TAYLOR, BETTY JEAN CUNNINGHAM and MICHAEL T. HOLLIFIELD,

Petitioners,

vs.

JOHN T. CAMPBELL, as Secretary of State of South Carolina, CARROLL CAMPBELL, as Governor of the State of South Carolina, and EARLE MORRIS, as Comptroller General of the State of South Carolina,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY BRIEF OF PETITIONER

Preliminary Statement.

Respondent's Brief in Opposition misstates the record in this matter and misinterprets key decisions of the Supreme Court in the area of the First Amendment, while at the same time conceding certain important points made

by Petitioners in its original petition. This reply brief is submitted to point out these errors and concessions.

STATEMENT OF THE CASE.

Respondents argue in their opposition that are numerous professional organizations representing various groups of state employees in the State of South Carolina that are excluded by the law in question. That is a totally misleading statement. The District Court found, and the Court of Appeals did not disagree that "the effect of the legislation was to deny payroll deductions for the SCEA, which was in 1981 the only employee organization actively seeking and currently receiving payroll deduction." (Petition for Certiorari, A-116). There was no evidence introduced to show that any other professional association was

seeking dues deduction or ever made any effort to obtain that benefit subsequently or was impacted or injured in any way. Indeed the only organization that came forward to complain about the law, the State Employees Association, received specific relief by name from the state legislature, as we previously pointed out (Petition for Certiorari, 25-28).

In addition, the Respondents have repeatedly referred to the fact that the legislation was "neutral on its face." But they completely ignore the fact that this supposedly "neutral" legislation was twice rejected by the General Assembly until it was amended to include the Marchant Amendment, which specifically prohibited dues deductions for professional associations that passed on any of the proceeds to a

Section 501 (c)(5) organization -- a situation that affected only the SCEA and the NEA and no one else that any witness could identify. (See Petition for Certiorari at 18-22, 9-60). The claim that this was facially neutral legislation with no improper purpose behind it is totally belied by the record.

I.

THIS COURT SHOULD REVIEW THE CONFLICT BETWEEN THE DECISION BELOW AND THE 11TH CIRCUIT DECISION IN GWINNETT COUNTY DEALING WITH PRECISELY THE SAME LEGAL AND FACTUAL ISSUE.

Respondent's Brief in Opposition places this case in the starkest possible posture for consideration by this Court. Respondents acknowledge that the decision in Gwinnett Association of Educators v. Gwinnett County School District, 856 F.2d 142 (11th Cir. 1988)

directly parallels the situation now before the Court, not only in its legal status, but in its factual presentation as well. They note that the individual school district in that case terminated dues deductions for the local education association because it was affiliated with the NEA, precisely the claim we make here. "The superintendent ...allegedly had become hostile toward the plaintiffs because of their association with the NEA." (Respondents Brief in Opposition at 25).

The 11th Circuit found that allegations that the school district had retaliated against a specifically targeted professional association because of its First Amendment activities stated a valid claim under Section 1983, since no governmental body can deprive an organization of a valued

benefit -- which all agree payroll dues deduction is -- because of its exercise of First Amendment rights.

Respondents now seek to distinguish Gwinnett County on the following basis: "Gwinnett County involved a challenge to an administrative decision of a five member local school board. This case involves a challenge to a legislative act of the 170 member South Carolina General Assembly acting in its sovereign capacity." (Respondents' Brief at 26). Elsewhere Respondents write that: "It is one thing for courts to inquire into the motives of public employers in making employment decisions; it is quite another for a court to inquire into the subjective motivation of the supreme sovereign body of a state..." (Respondents' Brief at 18).

In other words the Constitution prohibits an administrative agency or an executive department official from retaliating against a specifically targeted First Amendment actor on a local level because of its exercise of free speech rights. But the courts are forbidden to inquire into precisely the same acts against precisely the same group for precisely the same reasons when the governmental act is done by a state legislature on a state-wide basis. Respondents argue that the First Amendment does not apply to retaliatory legislation, only to administrative or executive retaliation, despite the fact that the words of the First Amendment speak only about legislative acts: "Congress shall make no law... abridging freedom of speech." (emphasis added).

Such an inverted concept of the First Amendment is directly counter to 200 years of our constitutional history and cannot be allowed to stand without review by this Court. The O'Brien case (United States v. O'Brien, 391 U.S. 367 (1968)) cannot be interpreted to prohibit an inquiry into legislative action which, if done on a local level by a school board or executive department official, would violate the Constitution. This situation must be interpreted as falling within the exceptions noted in O'Brien, namely "when the very nature of the constitutional question requires an inquiry into legislative purpose." 391 U.S. at 383, n. 10. The Court below was demonstrably wrong in interpreting O'Brien as barring an examination of

legislative purpose in a situation of this kind.

II.

PETITIONERS WERE NOT SEEKING TO INQUIRE INTO THE SUBJECTIVE MOTIVATION OF THE LEGISLATURE BUT WERE USING TRADITIONAL AND WELL-ESTABLISHED METHODS OF DETERMINING THE LEGISLATIVE PURPOSE OF THE SCHEME IN QUESTION.

Respondents try to divert this Court from the issues involved in this appeal by making constant reference to our attempt to determine the "subjective motivation of the legislature," as if we were trying to psychoanalyze all the members of the South Carolina General Assembly. (Respondents' Brief at 9). Nothing could be further from the truth.

In accordance with the traditional methods of discerning the purpose, intent or objective of a legislative scheme, Petitioners presented evidence of what the sponsors of the law said in

the legislative journals (see letter of Representative Marchant to the Attorney General about "a major point of concern being opposition to deductions for the [SCEA]" (Petition for Certiorari at 17), what was said on the floor, how much debate time was taken in discussing the SCEA and the NEA (80-90%, see id. at 11, n. 3) and other well-established methods of determining legislative intent. This followed the instructions of this Court in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977), where the Court established the methods by which inquiry into legislative (and administrative) purpose can be determined. It approved of the examination of "the legislative and administrative history...especially where there are contemporaneous

statements by members of the decisionmaking body..." This Court also noted that in "some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." Id. (In this case, no legislator-witness asserted any such privilege).

See also Edwards v. Aguillard, 107 S.Ct. 2573, 2579 (1987) (legislative purpose determined primarily on statements made by sponsor during legislative hearings); Wallace v. Jaffree, 105 S.Ct. 2479, 2490 (1985)(legislative purpose determined based on insertion of statement into record by sponsor and testimony of sponsor in later court hearing that he intended to return prayer to public

schools); Piper v. Chris-Craft Industries, 430 U.S. 1, 26-28 (1977) (legislative purposes of Williams Act determined based on statements by two cosponsors and testimony of witness before Senate Committee); Ohio v. Kovacs, 105 S.Ct. 705 (1985)(legislative purpose of Bankruptcy Code provision on discharge of claim to clean up hazardous waste determined based on statement of sponsor of Bankruptcy Reform Act).

In none of these cases was there any indication that this Court could not determine legislative intent because only a "handful of legislators" had spoken on the law. The Respondents' argument would make it impossible to determine what the objective of a law was unless a majority of voting members endorsed a particular position on its aim by a speech on the floor, an

impossible position contrary to every canon for interpreting legislative purpose.

In effect, Respondents are telling this Court that only if it blinds itself to what actually occurred during the 18-month campaign against the SCEA, can the law be upheld. There is nothing in the O'Brien case or the rules on interpreting legislative intent or purpose that can justify such a distorted view of constitutional analysis.

III.

THE FIRST AMENDMENT IS VIOLATED IF IMPORTANT ECONOMIC BENEFITS ARE DENIED TO A GROUP BECAUSE OF ITS EXERCISE OF FIRST AMENDMENT RIGHTS.

The Respondents argue that there was no constitutional violation here since there was no direct inhibition on First Amendment rights -- that is, the SCEA was still free to engage in political activities of every kind. Quoting from the opinion of the Fourth Circuit, Respondents claim that it is only when laws "directly inhibit or have the inevitable effect of inhibiting freedom of speech," is an inquiry into legislative purpose justified. (Respondents' Brief at 14).

This argument goes against fifty years of jurisprudence in this Court. As noted in Perry v. Sindermann, 408 U.S. 593, 597 (1972):

> "For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech. For if the government could deny the benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."

Similarly in Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 812 (1985), this Court noted that allegedly neutral laws and rules that on their face are not speech-inhibiting cannot be used as a facade "to suppress a particular point of view." But it is necessary to inquire into the purpose of the law or regulation to determine whether it has such a improper purpose.

These principles must be applied to the case now before the Court. The Fourth Circuit decision in requiring a showing of direct inhibition on First Amendment rights has ignored the holding of Perry and Cornelius and numerous other decisions of this Court that require an inquiry into the purpose and effect of laws regulating or sanctioning speech. Review by this Court of its distorted view of the First Amendment is necessary to bring it in line with 50 years of jurisprudence to the contrary.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

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February 6, 1990

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